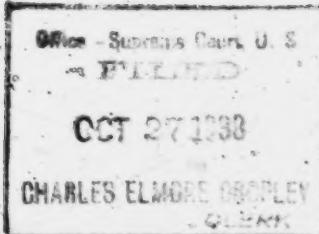




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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 244

THE CHIPPEWA INDIANS OF MINNESOTA,
Appellants,

vs.

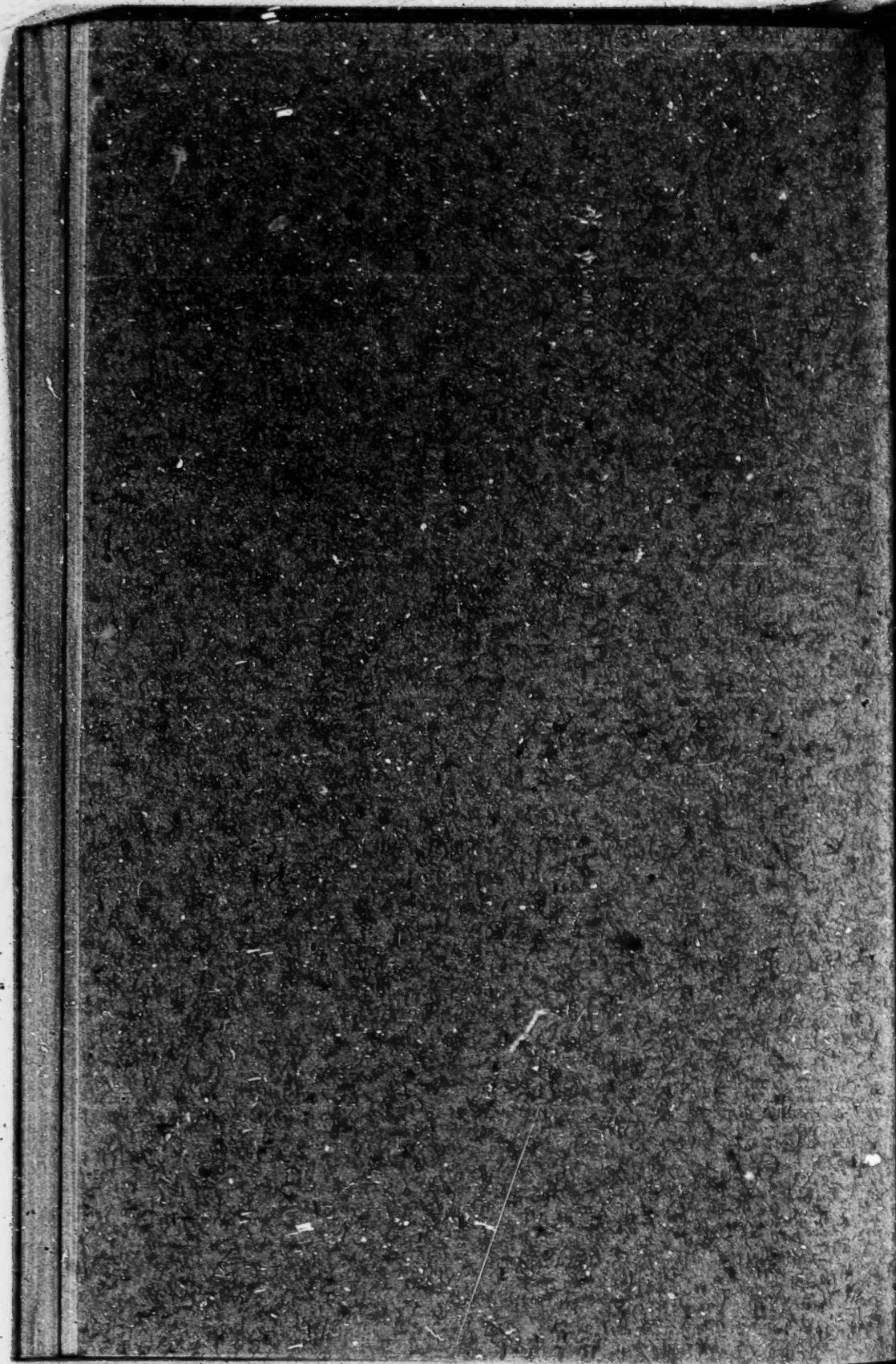
THE UNITED STATES,

Appellee.

APPELLANTS' BRIEF.

WEBSTER BALLINGER,
HOLMES, MAYALL, REAVILL AND
NEIMEYER,

Counsel for Appellants.



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THE CHIPPEWA INDIANS OF MINNESOTA,

Appellants,

vs.

THE UNITED STATES,

Appellee.

APPELLANTS' BRIEF.

Opinion Below.

The opinion of the Court of Claims appears in the record
at pages 36-48.

Parties Here and Below.

Appellants were plaintiffs, and appellee was defendant in
the court below, and will hereinafter be referred to as "ap-
pellants" and "appellee".

Jurisdiction.

The basis of jurisdiction of this Court is the Joint Resolu-
tion approved June 22, 1936 (R. 49).

Statement of the Case.

Petition was filed in the Court of Claims under the authority contained in the Special Jurisdictional Act approved May 14, 1926 (44 Stat. L. 555), as amended by the Acts of April 11, 1928 (45 Stat. L. 423) and June 18, 1934 (48 Stat. L. 979), the pertinent portions of which are set out in Finding 1, (R. 12-14). By said Act, as amended, (Sec. 1), jurisdiction was conferred on the Court of Claims to hear and render final judgment in any and all "legal and equitable" claims, arising under or growing out of the Act of January 14, 1839 (25 Stat. L. 342), or any subsequent acts of Congress in relation to Indian Affairs, the Chippewa Indians of Minnesota might have against the United States. Section 4 provides that if the Court finds that the United States, in violation of the terms and provisions of any "law, treaty or agreement as provided in section 1 hereof, has unlawfully appropriated or disposed of any" property of the Indians, damages shall be confined to the "value of the * * * property at the time of such appropriation or disposal, together with interest at five per centum per annum from the date thereof."

Thereafter, and by leave of Court, appellee filed an amended petition (R. 1).

The Claims in Suit.

The petition asserts two claims against appellee: (1) (Pet. pars. 4, 5, 6, R. 5-9) for the alleged appropriation of appellants' timber by appellee for its own use; and (2) (Pet. par. 7, R. 9), for the alleged disposal of appellants' lands; both without any consideration to appellants therefor, and in violation of the terms of an express trust (Pet. pars. 2, 3, R. 2-5).

Appellee's Traverse.

To appellants' amended petition, appellee filed a General Traverse (R. 10).

Hearings, Special Findings of Fact, Conclusions of Law, and Opinion.

The case came on for hearing on the merits, and was argued and submitted (R. 10). Five months later the Court, of its own motion, remanded the case to its calendar for oral argument on the items claimed by appellee as set-offs (R. 10). Thereafter the case came on for hearing on the set-offs, was argued and submitted and thereafter the Court made and filed Special Findings of Fact (R. 12-35), Conclusion of Law (R. 36), and its Opinion, in conformity with which judgment was entered dismissing Appellants petition (R. 36-48). Both parties filed motions for new trial and amended findings (R. 11), and the Court thereafter filed an order and memorandum (R. 11), allowing one amendment to the Special Findings of Fact requested by appellee, and with that exception, denied all other requests for amended findings and overruled both motions for new trial.

The Basic Facts Found by the Court or Shown by Public Records, Upon Which Appellants Rely.**The Express Trust Created by the Act of January 14, 1889 and Agreements.**

The Act of January 14, 1889, presented a proposal to all the tribes or bands of Chippewa Indians in Minnesota "for the complete cession and relinquishment" to appellee upon an express trust "of all their title and interest in and to all the reservations of said Indians in the State of Minnesota", except certain lands to be reserved for allotment.

purposes (R. 14, F. 4, Op., R. 38). The lands to which the Indian title was to be ceded were, by the express terms of the Act (R. 15, F. 6), to be by appellee, (1) surveyed and divided into 40 acre lots; (2) all lots upon which "there was standing or growing pine timber" were to be classified as "pine lands"; (3) the quantity and value of all pine timber standing or growing on any lot so classified was to be ascertained and determined; (4) a list was to be made containing a description of each 40 acre lot classified as "pine land", and opposite each such description was to be placed the actual cash value of the lot (which should include the value of the land as well as *all* timber thereon), but in no event was the valuation of the lot to be fixed at less than the value of the pine timber thereon computed at a rate not less than \$3.00 per thousand feet board measure; (5) the lists so prepared were to be subject to approval by appellee's Secretary of the Interior, and if approved, fixed the minimum price for which each lot could be sold; (6) each such 40 acre tract, when the listing thereof had been approved, was to be offered for sale at public auction, and sold, at not less than its appraised value, to the highest bidder, for cash; (7) all lands, not classified as "pine lands" were to be classified as "agricultural lands", and disposed of under the Homestead laws at \$1.25 per acre; and (8) the net proceeds received from all ceded lands were to be deposited "in the Treasury of the United States to the credit of *all* the Chippewa Indians in the State of Minnesota as a permanent fund" which was to draw interest at the rate of five per cent per annum, payable annually, for the period of fifty years, three-fourths of said interest to be paid annually to the Indians in cash, and one-fourth to be expended for their education; at the expiration of the fifty year period, the permanent fund was to be divided and "paid to the said Indians and their issue then living, in cash, in equal shares". All agreements were to be ap-

proved by the President before taking effect, and the Presidential approval, the Act declared, "shall be deemed full and ample proof of the assent of the Indians, and shall operate as a complete extinguishment of the Indian title without any other or further act or ceremony whatsoever for the purposes and upon the terms in this Act provided."

Thereafter the Indians, by agreements in writing, ceded all the lands in suit (R. 15, F. 5) upon the terms named in the Act, and the agreements were approved by the President (Op., R. 38).

By said agreements the Indians ceded "all their right, title, and interest" in the lands within the several reservations, which did not affect the title granted by the Act of March 12, 1860 (12 Stat. at L. 3) to the State of Minnesota to the swamp lands within a part of the reservations (U. S. v. Minn., 270 U. S. 181).

(Note.—The method of sale afforded opportunity to not only obtain a fair price for the *pine timber* and *land*, but also the value of *all other* kinds of timber standing thereon, at the time of sale.)

THE FIRST CLAIM IN SUIT.

The first claim (R. 5-9, Pet. pars. 4-6), is for part of the timber on certain of the ceded lands, alleged to have been appropriated by appellee for its own use, in violation of the express terms of the trust, and without any compensation to appellants therefor. This claim is based upon two subsequent Acts of Congress appropriating a part of the trust property for forestry purposes without the consent of appellants and without any compensation for a part of the timber taken.

Act of June 27, 1902.

(32 Stat. L. 400; Finding 7, R. 16-17.)

By the Act of June 27, 1902, appellee, in disregard of its duties and obligations under the express trust, and without

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the consent of appellants, amended sections 4, 5, and 7 of the Act of January 14, 1889, and thereafter administered the trust property as though the amendments were a part of the original Act of January 14, 1889, under which the cessions were made. The amendments to sections 4 and 7 are not here material. Section 5 was amended in the following material respects: (1) the merchantable pine timber on the lands classified as "pine lands" was to be cut and sold separate from the land; (2) appellee's Forester was directed to select 200,000 acres of the ceded lands classified as "pine lands", situate on certain defined reservations, which land, when so selected, was to be thereafter described as "forestry lands", and five per cent of the pine timber on the "forestry lands" when so selected, together with all the land, was to be permanently reserved; (3) in addition to the 200,000 acres to be reserved as "forestry lands", all lands and *all timber* thereon on the islands in Cass and Leech Lakes, not less than 160 acres at the extremity of Sugar Point on Leech Lake, the peninsula known as Pine Point, containing approximately 7,000 acres, and ten sections, all theretofore classified as "pine lands", were permanently withdrawn, and were to be thereafter known as "forestry lands"; (4) when the *merchantable pine* timber on any tract classified as "pine lands" and not reserved as "forestry lands", was removed, the tract (40 acres) was to be opened to homestead entry and disposed of at \$1.25 per acre; (5) when ninety-five per cent of all the merchantable pine timber on any tract reserved for forestry purposes, except the ten sections, islands and points, was removed, such tract was declared to "without further act, resolution or proclamation, forthwith become and be a part of the forest reserve, the same as though set apart by proclamation of the President, in accordance with the act of Congress approved March 3, 1891, and subsequent laws amending and supplementing the same, and

shall be managed and protected in accordance with the provisions and rules and regulations made and to be made in furtherance thereof."

(Note.—Although Appellee had agreed that the lands and all timber so appropriated should be sold for the benefit of the Indians, this Act (June 27, 1922) made no provision for ascertainment of values nor payment for the lands and timber thereon to be included in the Forest Reserve.)

Act of May 23, 1908.

(35 Stat. L. 268; Finding 8, R. 17-20.)

By the Act of May 23, 1908, appellee, in further disregard of its duties and obligations under the express trust, and without the consent of appellants, amended sections 4 and 5 of the Act of January 14, 1889, and thereafter administered the trust property as though the amendments were a part of the original Act of January 14, 1889, under which the cessions were made. The first sentence of this Act (35 Stat. L. 268), is as follows:

"That there is hereby created in the State of Minnesota a National Forest consisting of *lands and territory described as follows*, to-wit:" (Italics ours).

Then follows a detailed description of the exterior boundaries of 312,659.42 acres of land (R. 21-2, F. 10). The area so described included part of the 200,000 acres authorized by the Act of June 27, 1902 to be selected by appellee's Forester, and all of the ten sections, peninsula, islands and points specifically referred to in that Act. Provision was made for the permanent reservation from sale of the five per cent of the timber reserved by the Act of June 27, 1902; for the further reservation of ten per cent of the "merchantable pine timber" remaining on the uncut portions of the reserved lands outside of the ten sections, islands

and points; and for the sale, from time to time, of so much of the timber on the ten sections, islands and points, as the Forester might deem advisable in the conduct of the National Forest, *provided* that a commission of three persons should "at once" be appointed, consisting of one person to be designated by the President, one by the Secretary of the Interior and one by a general council of the Indians from four reservations therein named. This proviso further directed the commission to "proceed forthwith" to appraise the value of the five per cent of *merchantable pine* timber reserved under the Act of June 27, 1902, the ten per cent of *merchantable pine* reserved under "this Act", and *all* the timber upon the ten sections, islands and points, and to add to the value of said timber an amount equal to \$1.25 for each and every acre of land directed by "this Act" to be included in the reserve, and to certify their findings to the Secretary of the Interior. The Indians at the council, heretofore referred to, were authorized to select a representative, to serve without compensation, who was authorized, within sixty days after the commission certified its findings to the Secretary, to appeal therefrom to the President. The President was authorized to approve or modify the Commission's findings and his decision was made final, and the amount approved by him was directed to be certified by the Secretary of the Interior to the ~~Secretary~~ of the Treasury, and placed to the credit of all the Chippewa Indians in the State of Minnesota, in their trust fund, to draw interest at the rate of five per cent per annum as provided in the Act of January 14, 1889.

Section 5, (R. 19-20, F. 8) provided (italics ours):

"That all moneys received from the sale of timber from any of the land set aside by this act for a National Forest, *prior to the appraisal herein provided for* * * * shall be placed to the credit of the

Chippewa Indians in the State of Minnesota as provided for in . . . the Act of January 14, 1899 . . . and after said appraisal the National Forest hereby created, as above described, shall be subject to all general laws and regulations from time to time governing national forests, so far as said laws and regulations may be applicable thereto."

Section 6 (R. 20, F. 8), provided compensation to each commissioner at the rate of \$10.00 per day for every day actually spent upon the work, and then declared that "no commissioner shall be paid for more than 10 days' service."

(Note.—This Act made no provision for payment for any timber, other than "merchantable pine" (10 inches or over in diameter), standing on any of the ceded lands, to be included in the forest reserve, except timber on the ten sections, islands and points.)

Administration of 1908 Act.

The commission authorized in section 2 of the Act of May 23, 1908, to be "at once" appointed, was not appointed until December 18, 1922, or nearly fifteen years after the Act became operative. The first administrative step in its execution was an opinion, in writing, dated January 19, 1922, by the Solicitor for the Department of Agriculture, in which he held that payment could only be made for the lands and timber reserved under the 1902 and 1908 acts, as provided in the latter act; that under said Act, all timber of value on the ten sections, islands and points, should be taken into consideration and appraised "at its value as of the time of the appraisal"; that only the five and ten per cent of the merchantable pine reserved on the remaining ceded lands, included in the forest reserve were to be appraised, and the value thereof should be that "existing at the time of the appraisal." This opinion was approved

by the Solicitor for the Department of the Interior (R. 20, F. 9).

Thereafter, the Commissioner of Indian Affairs, evidently realizing that the commission authorized to be appointed by section 2 of the Act of May 23, 1908, could not complete the work of appraisal within the ten days limitation fixed in section 6 of the Act, on July 29, 1922 (R. 20, F. 9) appointed a committee, consisting of a representative of the Indian Office, a representative of the Forestry Service and a Chippewa Indian, to make a preliminary investigation of the claims "both legal and equitable" of appellants against appellee for the land and timber "authorized to be taken by the Act of May 23, 1908." This committee was particularly instructed (R. 21, F. 9) to:

- "1. Ascertain the exact forest area or acres of land to be paid for at \$1.25 per acre.
- "2. Ascertain the value of the timber reserved from cutting upon lands designated as "the Ten Sections", islands and points.
- "3. Ascertain the value of the so-called five per cent of timber left standing for reforestation purposes under the Act of June 27, 1902 (32 Stat. 400), and of the ten per cent of timber retained for reforestation under the Act of May 23, 1908 (35 Stat. 268).
- "4. Ascertain the value of the jack pine and hardwood timber and the white and Norway pine below ten inches in diameter for which the Indians by opinion of January 19, 1922, rendered by the Solicitor for the Department of Agriculture and concurred in by the Solicitor for the Department of the Interior, are not entitled to compensation under the law—Act of May 23, 1908." (Italics ours).

The committee made the preliminary investigation and appraisals as directed and on November 17, 1922, filed its written report (R. 21, F. 9).

Thereafter, and on December 18, 1922, the identical three persons who made the preliminary investigation were regularly appointed members of a commission to carry out the provisions of the Act of May 23, 1908 (R. 21, F. 10). The commission, as such, made no investigation in the field, and used as a basis for its report and award, the report of the committee, and under date of January 16, 1923, submitted its written report and award (R. 21, F. 10). In appraising the five and 10 percent of the reserved timber, the commission disregarded the instructions of the Solicitors of the departments of Agriculture and Interior, and adopted as its estimate as to quantity, the estimates made at the time the timber was reserved, and adopted, for the purposes of valuation, the prices at which the ninety-five and ninety percent of the timber cut from the same lands had previously been sold, for the reasons set out in the report of the preliminary committee, as follows:

"In this connection, the Solicitor of the Department of Agriculture was asked whether the commission in appraising the value of the five and ten per cent timber should use the basis of value prevailing; (a) at the time the commingled timber was sold; (b) at the time the Act of May 22, 1908, became effective; or (c) at the time the appraisal was made. He held, and the Solicitor of the Department of the Interior concurred in his opinion, that the value should be that existing at the date of appraisal. Both Solicitors felt that such an arrangement was most equitable to the Indians. Unfortunately, the contrary is the case. The value of timber is largely influenced by the cost of logging it and logging costs depend upon the quantity of timber available to carry costs of operation. With 90 or 95 per cent of the stand removed in the initial operation, the remainder is too small in quantity to permit profitable operation except in favored localities. As a result its value had depreciated, notwithstanding the fact that stumpage prices in general may have appre-

cially advanced. This is the case with reference to the major part of the timber reserved under the Acts of 1902 and 1908.

"Furthermore, approximately one-fourth of the reserved timber no longer exists as it was destroyed by fire, disease, insect-infestation, and particularly wind-fall-conditions which the Forest Service could not control. It is therefore not susceptible of appraisal at this time. A part of this timber has been disposed of by salvage sales, the receipts therefrom amounting to \$23,827.49, being deposited to the credit of the Indians. The remainder of the timber has decayed due to lack of means of utilization.

"In consideration of the conditions enumerated, the Commission feels that the only form of settlement equitable to the Indians is to determine the value of the reserved timber by multiplying the volume reserved on each section by the price per M. ft. B. M. at which the commingled timber was sold by the General Land Office"

(Note.—The report of the preliminary committee does not appear in the record. The record (R. 23, F. 11), does contain this statement, appearing in that part of the report of the commission dealing with "equities":

"These equitable considerations, which are fully set out in the report of the preliminary committee, are here briefly discussed as follows:" (Italics ours.)

The commission's report does not make clear that the Commission disregarded the instructions of the two Solicitors in valuing the five and ten percent of the reserved timber, nor does it set forth the reasons therefor. To clear this up, counsel for Appellants have gone outside of the record before this court, and in the absence of any denial on the part of counsel for Appellee, of the correctness of

the above quotation taken from the record in the court below, this court is requested to accept the same as though it were a part of the record here.

The Commission, (R. 21-2 F. 10) in its award, correctly found:

(1) That the exterior boundaries of the National Forest as defined in the 1908 Act, embraced a total of 312,659.42 acres;

(2) The acreage of the lands within the defined exterior boundaries of the forest reserve (exclusive of the allotted lands and townsites, and excluding also the State swamp land selections) as 190,944.93 acres; and its value, at \$1.25 per acre, as \$238,681.16;

(3) The value, *as of the date of the appraisal* (November 1922), of all timber on the ten sections, islands and points, as \$914,830.09; and

(4) The value of the five and ten percent of pine timber reserved under the Acts of 1902 and 1908, based upon the estimates as to *quantity* made at the times the timber was reserved, and the *prices* at which the ninety and ninety-five percent of the timber cut was sold from the same land, as \$336,684.33. The total of items (2), (3), and (4) resulted in a total award of \$1,490,195.58.

From the above award, the authorized representative of the Indians prosecuted an appeal to the President, but on April 9, 1923, the President approved the award, and on May 31, 1923, the amount was placed to the credit of the Indians (R. 22, 23, F. 10).

The Commission in its report, (R. 23-24 F. 11) stated that the values of the lands and timber included in its award,

"meet the legal requirements of the Act of May 23, 1908, but exclude equitable considerations in that they

make no provision for payment of the value of the white and the Norway pine below 10 inches in diameter or for any jack pine and hardwoods standing on lands other than the ten sections, islands, and points. ***

These equitable considerations which are fully set out in the report of the preliminary committee are here briefly discussed as follows:

"In his opinion of January 19, 1922, the Solicitor for the Department of Agriculture held that the use of the term 'merchantable pine timber' in relation to lands other than the ten sections, islands, and points, showed a clear intention on the part of Congress to allow the Indians compensation only for timber reserved from cutting which was merchantable at the time of the passage of the said Act of 1908. Since the preponderance of evidence was to the effect that the white and Norway pine under 10 inches in diameter, and jack pine and hardwoods of all diameters was not commonly regarded as merchantable in 1908, it was the belief of the said Solicitor that no allowance should be made for such classes of timber in determining the amounts to be paid to the Indians. The Solicitor of the Department of the Interior concurred in this view. Because of these opinions the Commission in determining the amounts due the Indians excluded from their appraisal all such timber standing upon lands cut over under the Acts of 1902 and 1908.

"The Commission finds, however, that these classes of timber now possess well-defined and considerable commercial value, which as a matter of equity should be recognized by the Government; and, therefore, recommends that Congress be asked to enact legislation authorizing the appraisal of said timber and proper payment to the Indians therefor ***" (R. — F. 11).

"The volume and the exact value of such timber have not been determined by careful estimate and appraisal; but superficial estimates and appraisals conducted jointly by representatives of the Indian Service and of the Forest Service during the fall of 1922, resulted in finding the value thereof to be approximately \$1,060,887.70."

The fair value of the timber, other than "merchantable pine", standing upon that part of the 190,944.93 acres outside of the 10 sections, islands and points, at the time the appraisal was made, for which appellants have received no consideration, is \$1,060,887.70 (R. 27, F. 14). This constitutes the first claim in suit.

Four other claims found by the Commission to be equitable, and their payment by direct appropriation by Congress recommended (R. 23-5, F. 11; Op. p. 40-1) were for, (1) the value of mature pine timber on 18 parcels of "pine land" that remained uncut and unsold, *computed as of the date of the appraisal*; (2) the value of merchantable pine timber on lands erroneously classified as "agricultural lands", *computed as of the date of the appraisal*; (3) *interest* from January 1, 1909 to January 1, 1923 on (a) the value of the five and ten percent of the reserved timber, computed as to quantity from the estimates made at the time the timber was reserved, and as to value at the prices at which the 95 and 90 percent of the remaining timber was cut from the same lands and sold, and (b) the value of the land, based upon the arbitrary price of \$1.25 per acre fixed in the Act. The reasons given by the Commission for recommending as equitable claims the allowance of interest on the two items above enumerated are stated in its report (R. 24, F. 11) as follows:

"Had the settlement authorized by the act of 1908 been made promptly as the law required, the money due the Indians for the lands within the forest—190,914.93 acres at \$1.25 per acre—amounting to \$238,681.16, and for the five and ten per cent reserved seed trees of white and Norway pine amounting to \$336,684.33, would have been credited to them on the books of the Treasury, and would have begun to draw interest at the rate of five per cent per annum—probably not later than January 1, 1909. The Indians to date have lost 14 years

interest or the equivalent of seventy per cent of the value which would have been found in 1903."

"All equities, aggregating \$422,929.01, found by the commission, save and except the one in suit in the first claim, were later recognized by Congress and paid by direct appropriation (R. 25-26, F. 12).

December 5, 1923, a bill was introduced in the House of Representatives entitled "A Bill to compensate the Chippewa Indians of Minnesota for certain equities claimed by them in connection with the settlement for the Minnesota National Forest", and authorizing an appropriation out of the Public Treasury of \$1,060,837.70, designed to carry out the recommendation of the preliminary committee, adopted by the commission (R. 24, F. 11), wherein it was recommended that Congress be asked to enact legislation authorizing the appraisal of all merchantable timber on all lands classified as pine lands other than the ten sections, islands and points, and the five and ten per cent reserved under the Acts of 1902 and 1908, for which the commission was unable, under the terms of the Act of May 23, 1908, to award compensation. The bill was considered by a sub-committee of the House Committee on Indian Affairs, before whom an attorney representing appellants appeared and objected on behalf of appellants to the enactment of the bill into law, if it was designed and intended as a complete settlement of all claims the Indians had against the United States for the lands and timber included in the National Forest, and requested that this claim, together with all other claims of the Indians, be referred to the Court of Claims for judicial determination. No action was taken by the committee or Congress on the bill, and thereafter Congress enacted, and the President approved on May 14, 1926, the jurisdictional act under which this claim is being prosecuted (R. 26-7, F. 13).

FACTS UPON WHICH SECOND CLAIM IS ASSERTED.

Prior to the adoption of the Act of January 14, 1889, appellee had assumed to survey and establish the boundaries of the reservations in Minnesota occupied by the Chippewa Indians of that State. In making the surveys and establishing the boundaries prescribed by treaties, errors occurred, as a result of which there were wrongfully excluded from the Indian Reservations as established by prior treaties, a total of 16,365.80 acres of land, which land appellee, in consequence of said errors in the surveys and prior to January 14, 1889, disposed of under the public land laws, without any consideration to the Indians. The Indian title to all lands within the true boundaries of said Indian Reservations was ceded to appellee by the agreements entered into under the Act of January 14, 1889, including said 16,365.80 acres. By reason of the cession of the title to these lands by the agreements made under the Act of January 14, 1889, appellee agreed to dispose of these lands for the benefit of the Indians, which it was unable to do by reason of prior disposal, the fair and reasonable value of the lands being \$1.25 per acre (Pet. par. 7, R. 9, F. 15, R. 26-7).

Assignments of Error.

From the judgment of the Court of Claims, appellants prosecuted this appeal, assigning the following error (R. —) :

I.

In holding that the appropriation by defendant of all lands and the timber embraced in the National Forest of Minnesota (which included the timber in suit in the first claim), was effected by the Act of May 23, 1908, and as of the date of said Act, and not as of the date when the timber

was appraised, the appraisal approved by the President on April 9, 1923, and payment made.

II.

In holding that the amount to which plaintiffs were entitled on account of the creation of the Minnesota National Forest was to be determined by the value of the property taken as of the date of the Act of May 23, 1908, and that in consequence plaintiffs were not entitled to recover for white and Norway pine under ten inches in diameter, jackpine and hardwoods standing and growing on the lands taken, and which at the date of the approval of the appraisal by the President were of the fair value of \$1,060,887.70.

III.

In holding with reference to the second claim in suit that plaintiffs did not allege in their amended petition that the claim arose or grew out of the Act of January 14, 1889, and, further was not within the claims submitted to the court for determination by the jurisdictional act of May 14, 1926.

IV.

In holding as a conclusion of law that plaintiffs were not entitled to recover on either claim, and directing that plaintiffs' petition be dismissed.

V.

In entering judgment dismissing plaintiffs' petition.

Questions for Decision.

Three questions are here presented for decision:

- (1) Did the Act of May 23, 1908 appropriate, or take, all, or any part, of the lands described in section 1 of said Act,

and timber thereon, including the timber embraced in the first claim, as of the date of said Act, or as of the date the timber was appraised by the commission appointed under the Act?

(2) Are appellants entitled to payment for the timber in suit as of its value on May 23, 1908, or as of its value when the timber was appraised by the commission appointed under the Act of May 23, 1908?

(3) Is the second claim sufficiently alleged in the amended petition and did it arise or grow out of the Act of January 14, 1889?

Summary of Argument.

Affirmance or reversal of the judgment appealed from, so far as it relates to the first claim in suit, depends upon the correct construction of the Act of May 23, 1908 (35 Stat. at L., 268; R. 17-20, F. 8; *infra*, pp. 21-9). The property in suit was the property of Appellants held by Appellee under an express trust. The 1908 Act directed its acquisition for inclusion in a national forest. The court below held that the 1908 Act operated as an immediate appropriation, or taking, basing its conclusion (R. 42-4) upon the first sentence of Section 1, detached words or clauses appearing in Section 5, and an inference drawn by the court from a Congressional appropriation (*infra*, pp. 25-8), and failed to give effect to the obvious intent of Congress drawn from the entire Act, prior related Acts, and Appellee's status as trustee, which we submit, clearly indicated that Congress did not intend that any appropriation, or taking, should occur until the fair value of the property was ascertained, determined, and paid, consonant with constitutional requirements (*infra*, pp. 21-5; 29).

The second claim in suit was rejected by the court below on the ground that it was not sufficiently alleged in the

amended petition that the claim arose under, or grew out of, the Act of January 14, 1889 (Op., R. 46-7). The correctness of the ruling of the court below upon this question is to be determined from an examination of the amended petition (R. 9, Pet., para. 7; *infra*, pp.—), which, when liberally construed, clearly sets forth that the claim arose under, and grew out of, the Act of January 14, 1889 (*infra*, pp.—).

ARGUMENT.

First Question.

The first two questions, raised by the first two Assignments of Error, relate to the first claim, which is for the value, as of the date of the appraisal of *all timber*, other than the reserved "merchantable pine", standing on the 190,994.93 acres, exclusive of the ten sections, islands and points, within the boundaries of the National Forest, with interest. The court below found that this timber, on the date of the Act of May 23, 1908, was not "commonly regarded as merchantable at the time of the passage of the Act of 1908", but that its value in November, 1922, and at the time all of Appellants' timber taken under said Act was appraised, was \$1,060,887.70. The date when the actual appropriation occurred is, therefore, important, and brings us to a consideration of the first question, presented by the first Assignment of Error. ◊

Appellee contends that the lands and timber were appropriated by the Act of May 23, 1908, as of the date of said Act. Appellants contend that the appropriation did not occur until the timber was appraised and the appraisal approved by the President.

The court below sustained Appellee's contention, its reasons therefor being set out in its opinion (R. 42-4).

As will be observed from the opinion of the court below, its conclusion is based upon the language appearing in Sec-

tion 1, detached words or clauses appearing in Section 5, and an inference drawn by the Court from a congressional appropriation. We submit that Sections 1 and 5 are to be construed in connection with the whole statute, as well as the Act of January 14, 1889 and the agreements made thereunder, and is to be given such construction as will carry into execution the true intent of Congress (*Helevering v. New York Trust Co.*, 292 U. S. 454 at 464). It should further be given such a construction as will not imperil its validity when it is reasonably open to a construction free from such peril, *Chippewa Indians v. U. S.*, 301 U. S. 358 at 376. With these rules of construction as our guide, we shall proceed to consider the Act.

Act of May 23, 1908.

The first section of the Act of May 23, 1908 (35 Stat. at L. 268; R. 17, F. 8), which is abbreviated in the findings, is:

"That there is hereby created in the State of Minnesota a National Forest consisting of lands and territory described as follows, to-wit:"

Then follows a minute description of the exterior boundaries of the National Forest (35 Stat. at L., 268), embracing 312,659.42 acres (R. 21, F. 10).

If there was an instantaneous taking, by Section 1, of any of the lands and timber within the boundaries therein described, then *all land and timber within said boundaries was taken as of the date of the Act*, for the language is all embractive, with no qualification or limitation. Of the total acreage so included, 81,588.05 acres were embraced in State swamp land selections; 39,725.96 acres in individual allotments; and 480 acres in patented townsites, or a total of 121,714.31 acres (R. 22, F. 10).

By Section 3 (R. 19, F. 8) provision was made for the ultimate acquisition of the "allotted lands" within the

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boundaries definitely fixed in Section 1 by voluntary relinquishment to be negotiated and secured from the individual allottees. Obviously there was no instantaneous taking of the allotted lands, the title to which could, by the express terms of the Act, only be acquired by voluntary relinquishment.

No provision was contained in the act for the acquisition of the lands embraced in the "townsites" and in the "State swamp land selections" within the boundaries described in Section 1. As to these lands, while the Act evidences an intent for their ultimate acquisition for forestry purposes, it leaves the time and manner of acquisition, assessment of damages and payment, for future consideration; and it cannot be seriously contended that the Act operated as an instantaneous taking of the vested property rights of the State of Minnesota and the owners of the land within the townships, which would have been beyond the power of Congress.

Note.—In Finding 10, (R. 21-2) the Court includes the statement that the State swamp land selections, individual Indian allotments, and patented townships "constituted no part of the National Forest". This Finding is based upon the fact that Appellee has taken no steps to acquire title to any of these lands. This statement was objected to in the request for amended findings, which was denied, and this Court is asked to disregard this portion of Finding 10 as a mere conclusion of law, shown by the 1908 Act to be erroneous.

As to the acquisition by Appellee of Appellants' timber on the ten sections, islands and points, and within the boundaries of the National Forest, Section 2 (R. 18-19, F. 8) expressly provided that *before any of said timber could be cut or sold, the following acts should be performed:*

(a) The appointment of a commission, consisting of three persons, one to be designated by the President, one by the Secretary of the Interior, and one by the Indians;

(b) The appraisal by said commissioners of the 5% of timber reserved under the Act of 1902, the 10% reserved under the Act of 1908, and the timber on the 10 sections, islands and points, to the total of which said commissioners were directed to add an amount equal to \$1.25 "for each and every acre of land not otherwise appropriated which they find covered by the provisions of this Act, and shall certify the same to the Secretary of the Interior"; and

(c) The amount finally determined by the President was placed to Appellants' account in the permanent fund created by the 1889 Act and the agreements.

Section 5 provided:

"That all monies received from the sale of timber from any of the land set aside by this Act for a National Forest, prior to the appraisal herein provided for * * * shall be placed to the credit of the Chippewa Indians in the State of Minnesota as provided for in * * * the Act of January 14, 1889 * * * and after said appraisal the National Forest hereby created, as above described, shall be subject to all general laws and regulations from time to time governing national forests, so far as said laws and regulations may be applicable thereto." (Italics ours.)

While it is apparent from the face of the Act that Congress intended that Appellee should acquire title to the lands and timber within a very limited time after the date of the Act, it is also evident from the proviso to Section 2 and the provisions of Section 5, that Appellee did not intend that any of the lands and timber should be appropriated, or taken, or that title should pass, until Appellee had fully performed and extinguished its duties as trustee, for by the proviso to Section 2, the value of the land was to be fixed

as of the date of the completion of the appraisal of the timber by the Commission, and no timber could be cut and sold from the ten sections, islands and points until the appraisal and payment were made; and by Section 5 all monies received from the sale of all timber on any of the lands "prior to the appraisal" was directed to be placed to the credit of the Indians, and only after said appraisal was the National Forest to become subject to Appellee's general laws and regulations governing national forests. The Presidential determination of the fair value of the timber and land which, under the Act, was final, fixed the date of "appraisal", and the date of appraisal established the date of the appropriation or taking (*U. S. v. North American Transp. & Trading Co.*, 253 U. S. 330, at 333-4).

The provision to Section 2 and the provisions of Section 5 above referred to are wholly inconsistent with an appropriation or taking or assertion of ownership prior to the appraisal and payment.

Construction of 1908 Act by Appellee's Officers.

When the Act of May 23, 1908, came before the Solicitor for the Department of Agriculture and the Solicitor for the Department of the Interior, both concurred in the conclusion that all timber of value on the ten sections, islands and points should be taken into consideration and appraised "at its value as of the time of the appraisal"; that the 5 and 10% of the pine, merchantable in 1908 (R. 23, F. 11) reserved on the remaining lands, should be appraised, and the value thereof should be that "existing at the time of the appraisal" (R. 20, F. 9), which of necessity were holdings by both Solicitors that the taking would not occur until after appraisal and payment. If the Solicitors had viewed the 1908 Act as effecting an immediate taking they would have directed the appraisals to be made as of the date of the Act, *Brooks-Scanlon Corp. v. U. S.*, 285 U. S. at 123).

The Commissioner of Indian Affairs in 1922, following the opinion of the two Solicitors, considered and treated the land and timber to be taken under the 1908 Act as then Appellants' property. This is evident from the letter of the Commissioner of Indian Affairs dated July 29, 1922 (R. 20-3, F. 9) to the preliminary Committee, written in conformity with the duties imposed upon him by law (T. 25, Sec. 2, U. S. C. A.), wherein the Committee was directed to ascertain the value of the identical timber in suit in the first claim, (instruction 4) the Commissioner realizing appellee's liability for its fair value, notwithstanding the Act of 1908 made no provision for its payment.

Here we have the construction of the Act by the Solicitor for the Department of Agriculture, of which the Bureau of Forestry was, and is, a part, concurred in by the Solicitor for the Department of the Interior, having jurisdiction over all Indian lands, and followed by the Officers of the Department of the Interior in the administration of the law. Such administrative construction, even if the 1908 Act is doubtful and ambiguous as to the time of the appropriation, is entitled to great respect (*Edwards v. Darby*, 12 Wheat. 206, at 210), and should not be disregarded except for cogent reasons (*U. S. v. Moore*, 95 U. S. 763).

Note.—It is stated in the opinion (R. 423) that the contention of counsel for Appellants in the lower court was "based solely on the provisions of Section 5 of the Act of 1908", which is error. The reasons advanced in the lower court in support of counsels' position there, are the identical reasons advanced in support of their position in this Court.

Reasons Given by Court Below for Its Ruling.

The court below (Op., R. 43-4) rests its decision upon (1) the first sentence of Section 1 of the 1908 Act, viz:

"That there is hereby created in the State of Minnesota a National Forest consisting of lands and territory described as follows:"

(2) the italicized part of the following sentence appearing in Section 5, viz:

"That all moneys received from the sale of timber from any of the lands set aside by this act for a National Forest, prior to the appraisal herein provided for . . . shall be placed to the credit of the Chippewa Indians in Minnesota . . . ; and after said appraisal, the National Forest hereby created as above described, shall be subject to all general laws and regulations . . . governing national forests . . . and,

(3) the subsequent act of Congress providing "for the payment of back interest for a period of 14 years" on the values of the five and ten per cent of the reserved timber and land.

The court below, after quoting Section 5 (R. 43) says:

"We do not think the language of section 5 is susceptible to the construction plaintiffs place upon it. In the first place, the section uses the words, 'the lands set aside by this Act as a national forest,' and also, 'the national forest hereby created'. These words, as well as the words employed in section 1 of the act, 'That there is hereby created in the State of Minnesota a national forest consisting of lands and territory described as follows: . . . are of the present tense and in the absence of other language in the act showing a contrary intent impel the conclusion that it was the intention of Congress to appropriate the lands included in the national forest and the timber growing thereon as of the date of the act May 23, 1908, and not at some subsequent date.'"

It will be observed that the court below completely overlooked Appellee's trust relation to the property and its duty to Appellants; that it attached no importance to the proviso to Section 2 requiring the value of the land to be fixed as of the date the appraisal of the timber was completed and prohibiting the cutting or sale of the reserved timber until

after its appraisal and payment; that it attached but little or no importance to the provisions of Section 5 requiring the deposit of all monies received from the sale of timber "from any of the lands set aside by this Act for a national forest prior to appraisal" to the credit of Appellants, and the further provision that until the appraisal was made, the general laws applicable to national forests should not apply to the national forest created by that Act; and that it construed the Act as relating solely to the acquisition of Appellants' lands within the defined boundaries, which, we submit, clearly indicated an intent on the part of Congress to fully and faithfully discharge its duties as trustee before any actual taking of the land and timber of its wards should occur.

The court below, following immediately the quotation just before quoted, says (R. 43) (Italics ours):

"That this was the intention of Congress was further and, we think, conclusively shown by the fact that Congress provided for the payment of back interest for a period of 14 years on the 1908 value of the lands and the reserved merchantable pine. This action of Congress can not be explained or justified on any theory other than that Congress construed the act of May 23, 1908, as having effected an appropriation or taking of plaintiffs' property as of the date of its approval."

No provision was made in the Act referred to for the payment of interest on the 1908 values of either land or timber, as neither was valued as of that date, (*supra*, pp. 9-12). The appropriation (R. 25-6, F. 12) referred to by the Court was in payment of (R. 24-5 F. 11; Op. R. 41), (1) the value of mature pine timber on 18 parcels of "pine lands" that remained uncut and unsold, computed *as of the date of the appraisal*; (2) the value of merchantable pine timber on lands erroneously classified as "agricultural lands", computed *as of the date of the appraisal*; (3) interest from

January 1, 1909 to January 1, 1923 on (a) the value of five and ten percent of the reserved timber, computed as to quantity from the estimates made at the time the timber was reserved, and as to value at the prices at which the 95 and 90 per cent of the remaining timber was cut from the same lands and sold (*supra*, pp. 10-12), and (b) the value of the land based upon the arbitrary price of \$1.25 fixed in the act. The 1908 Act contained no provision for payment of the timber referred to in Items 1 and 2, for which Appellee was plainly liable, and the reasons given by the Commission for recommending the allowance of interest on Item 3, "a and b", are stated in its report (R. 24, F. 11) as follows:

"Had the settlement authorized by the Act of 1908 been made promptly as the law required, the money due the Indians for the lands within the forest—190,944.93 acres at \$1.25 per acre—amounting to \$238,681.16, and for the five and ten per cent reserved seed trees of white and Norway pine amounting to \$336,684.33 would have been credited to them on the books of the Treasury, and would have begun to draw interest at the rate of five per cent per annum—probably not later than January 1, 1909. The Indians to date have lost 14 years interest, or an equivalent of 70 per cent of the value which would have been found in 1908."

The appropriation authorized in the Act of February 2, 1925, and referred to in the opinion of the court below, we submit, was merely a payment for timber taken by Appellee, of the same character as the timber in *suit* in the first claim, for which no provision for payment was contained in the 1908 Act, and for loss of interest on three items in the award Appellants had sustained solely as the result of Appellee's negligence, which Congress believed, following the recommendation of the Commission, in equity and good conscience, Appellants should be compensated for. The payment had no relation to any claim that the land and

timber had been appropriated, or taken, as of May 23, 1908.

Counsel for Appellants submit that the court below mistakenly construed the Act of 1908 as limited to only Appellants' lands within the boundaries described in Section 1, mistakenly overlooked Appellee's relation as trustee to the land and timber, mistakenly attached undue importance to detached words, or clauses appearing in the Statute, and failed to give proper consideration and attach proper importance to other provisions of the Statute and related Acts, and the interpretation of the Act by the administrative officers, and lastly, drew an erroneous conclusion from the appropriation in payment of interest, as hereinbefore pointed out, all of which contributed to, we believe, the mistaken conclusion that Appellants' lands and timber were taken as of May 23, 1908.

The construction contended for by appellants, we submit, is consonant with constitutional requirements. If Congress had intended that the Act should operate as an instantaneous appropriation, or taking, provision would have been made for the ascertainment of the values of all land and timber within the boundaries defined in Section 1, as of the date of the Act, and interest on the ascertained values from the date of the Act to the date of payment. This would have been necessary to have met the constitutional requirements of just compensation (*Brown v. U. S.*, 263 U. S. 78, at 85, 86). The construction contended for by Appellee and sustained by the court below, imputes to Congress an attempt to take Appellants' property, held by it under an express trust, without the payment of just compensation as required by the Constitution, an imputation, we submit, the record does not justify.

The Second Question.

The second question presented for decision is, whether appellants are entitled to payment for the timber in suit

as of its value on May 23, 1908, or as of its value when the timber was appraised by the commission appointed under the Act of May 23, 1908? The answer to the first question will control the answer to the second question, as appellants are entitled to only just compensation for the property taken, as of the date it was taken, with interest to date of payment. *Brown v. U. S.*, 263 U. S. 78, at 87-88; *Seaboard Air Line R. Co. v. U. S.*, 261 U. S. 294 at 304; *Monongahela Nav. Co. v. U. S.*, 148 U. S. at 324-8; *Shoshone Tribe v. U. S.*, 299 U. S. 476 at 497.

The court below found that the timber in suit was not commonly regarded as merchantable in 1908 (R. 23, F. 11) but that its value as of 1923 was \$1,060,887.70 (R. 27, F. 14).

The Third Question.

The third question raised by the third assignment of error (R. 51) is whether the second claim is sufficiently alleged in the amended petition and arose or grew out of the Act of January 14, 1889. The seventh paragraph of the amended petition (R. 9) is as follows:

"7. Prior to the adoption of the Act of January 14, 1889 (25 Stat. 642) the defendant, the United States had assumed to survey and establish the boundaries of the reservations in Minnesota. In the making of such surveys and establishing of such boundaries errors occurred, as a result of which there were wrongfully excluded from the Indian Reservation as the same had been established by prior treaties with the Indians, a total of 16,365.80 acres of lands, which lands the defendant, United States, in consequence of errors aforesaid, and prior to January 14, 1889, had disposed of under its public land laws without any credit to the Indians therefor. All lands within the true boundaries of said Indian reservations were ceded by the Indians to the defendant, United States, by the agreements entered into under said Act of January 14, 1889,

and the United States by said agreements agreed that all said lands including said 16,365.80 acres wrongfully excluded from said reservations and previously disposed of as aforesaid, should be disposed of for the benefit of the Indians under said Act. By reason of said prior disposal said lands were never disposed of for the benefit of the Indians nor has any payment been made on account thereof, the fair and reasonable value of said lands being \$1.25 per acre."

The court below (R. 46) held that appellants "do not allege in their amended petition . . . that the claim arises or grows out of the act of January 14, 1889, or any subsequent act of Congress", and (R. 47) that as its jurisdiction was limited to "legal and equitable claims arising under or growing out of the Act of January 14, 1889, or arising under or growing out of any subsequent act of Congress", it was too clear for argument that this claim was outside of its jurisdiction, however meritorious it otherwise may be.

The allegations of the petition are to be liberally construed and when so construed, we submit, clearly set forth that the Indian title to the 16,365.80 acres was ceded to defendant by the agreements made under the Act of January 14, 1889, and the defendant therein agreed to sell and dispose of all lands, to which it received the Indian title by the agreements of cession, for the benefit of plaintiffs, which it was unable to do by reason of their prior unauthorized disposal by ~~appellee~~. This allegation clearly brought the claim within the provisions of the jurisdictional act as one arising under or growing out of the Act of January 14, 1889, and states a claim under the jurisdictional act. We respectfully submit that in rejecting this claim on the grounds stated in the petition, the lower court committed reversible error.

Set-Offs.

To appellants' two claims asserted in the court below, appellee asserted numerous items of set-off (F's. 16-both inclusive), none of which was considered by the court below, and no decision reached thereon, in view of the judgment of the court dismissing appellants' bill (R. 47-8).

If the judgment of the lower court is reversed, the case must be remanded to the lower court for determination of the items of set-off.

Conclusion.

Counsel for appellants respectfully submit that for the reasons hereinbefore stated, the court erred in rejecting appellants' first and second claims, in dismissing appellants' bill and entering judgment for appellee, and that the judgment should be reversed and the case remanded for further proceedings in conformity with the order of this Court.

Respectfully submitted,

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